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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

LIEUT. WILLIAM DOWNEY, U. S. A., ET AL.,
Petitioners,

vs.

THE HON. DWIGHT H. GREEN, EX OFFICIO IN THE CAPACITY HEREINAFTER DESIGNATED,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

URBAN A. LAVERY and
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Respondent.

PETITION FOR CERTIORARI.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Come now the Petitioners, Lieut. William Downey, U. S. A., Sgt. Walter Cahill, U. S. A., and Sea. Richard Cahill, U. S. N. (original Plaintiffs below), by Urban A. Lavery, their attorney, and also Sgt. Erwin Kondrat, U. S. A., and Pvt. Walter A. Deans, U. S. A. (Intervening Plaintiffs below), by Francis Heisler, their attorney, each of the said Petitioners being a member of the Armed Forces of the United States, and in that behalf the Petitioners respectfully pray that a Writ of Certiorari be issued by this Court to review the judgment below of the United States Circuit Court of Appeals for the Seventh Circuit, finally entered on August 15, 1944, affirming, without opinion, a certain judgment of the District Court of the United States for the Northern District of Illinois, entered on July 26, 1944.

Judgments Below.

By its judgment last mentioned, the District Court had sustained a "Motion to Dismiss" this alleged cause of action for lack of jurisdiction over both the defendant and the subject matter of the Complaint, and had dismissed the case (R. 46).

The judgment of the Circuit Court of Appeals was accompanied by a *"Per Curiam"* memorandum (R. 68) which concluded with the statement: "The judgment [of the District Court] is affirmed without opinion."

Emergency Hearings by Lower Courts.

The Record shows that the District Court at the request of counsel on both sides, advanced the cause for emergency hearing, in vacation time, and heard and disposed of the case on July 25, 1944, within a few days after it had been put at issue (R. 44). The Record also shows that an appeal was promptly taken and perfected, and that the Circuit Court of Appeals (upon the Motion of Appellants to advance the cause, and upon the request and consent of counsel on both sides) likewise took the cause for emergency hearing and disposition in vacation time. Oral argument was heard by the Court of Appeals on August 10, 1944, and the cause was finally decided by that Court on August 15, 1944. (R. 66.)

Thus, through the consideration and expedition of both the District Court and the Court of Appeals, this cause, which was put at issue in the trial court on July 17, 1944, was finally disposed of on review, in the Circuit Court of Appeals, within one month thereafter.

The facts just recited clearly indicate that the District, and the Circuit Court of Appeals, both were in agreement

that the cause involves a legal controversy of large public interest which deserves emergency and expeditious hearing by the Courts.

Jurisdiction.

Jurisdiction of the Supreme Court is claimed on the ground that the judgments of the District Court and the Circuit Court of Appeals construed and interpreted certain Acts of Congress, and the Constitution of the United States, in such a way as to deprive the Petitioners (and more than 300,000 other Service men in the State of Illinois, similarly situated), of their civil rights, and particularly the right to vote in the Federal Election, of November 7, 1944, contrary to the statutes and Constitution of the United States.

Specifically, the jurisdiction of this Court is invoked under Sections 237b and 240a of the Judicial Code as amended, and under Rule 38 of this Court.

Venue.

The plaintiffs below, as already indicated, are citizens of the State of Illinois, residing in the Northern Judicial District of Illinois. The defendant also is a citizen of the State of Ilinois and a resident of the same judicial district. The right of the plaintiffs to bring this suit in that district and to sue the defendant in that district (that is, the question of venue) is claimed under the Civil Rights provision of the Judicial Code of the United States already mentioned. No question of venue has been raised in the case or is here involved.

A Class Suit.

This action is brought as a class suit on behalf of the plaintiffs and on behalf of more than 300,000 other Service men and women from the State of Illinois (as it

is charged) who are similarly situated to the plaintiffs and who constitute a group too numerous to make it practicable to bring them all before the Court; thereby authorizing a class suit on their behalf, in accordance with the Federal Rules of Civil Procedure concerning such suits. (Rule 23, U. S. C. A., Title 28, following Sec. 723(c).)

Summary Statement of Matters Involved.

The Petitioners here are five Servicemen in the Armed Forces of the United States who are citizens and residents of the State of Illinois, duly qualified to vote in the coming Federal Elections, in November 1944. The Complaint, which was filed June 24, 1944, seeks *declaratory relief only*, under the Federal Declaratory Judgment Act. (Section 274 of the Judicial Code; U. S. C. A., Title 28, Sec. 400.)

The Plaintiffs merely sought a "*declaration of their rights,*" under the Federal Wartime Voting Act of 1944, (Public Law 277, Chapter 150, Laws, 78 Congress, 2nd Session; U. S. C. A., Title 50, Sections 301, *et seq.*) from the Federal Courts, against the defendant, who, as Governor of a State, was delegated by a Federal Statute, with certain discretion and power of decision as to the use and application, in his State, of the so-called "Federal Ballot." No *State Statute* whatever is involved in the case.

As to the relief asked, it is essential to remember that *no coercive relief whatever* is sought in this case. Although the Complaint does not say so in affirmative fashion, it is clearly drawn on the theory that the defendant, as a responsible public official, will obey and respect the judicial interpretation of the Act of Congress in question, when that Act has been construed by the Courts. It is clearly the theory of the Complaint, therefore, that there can be no impinging by the Courts on the defendant's prerogatives; and there can be no question of "States Rights" involved in the case.

In a jurisdictional sense, the plaintiffs below sued under the so-called Civil Rights Act of the United States, and particularly Section 24 of the Judicial Code (U. S. C. A., Title 28, Sec. 41), which vests the Federal Courts with jurisdiction,—

> "* * * to redress the deprivation, under color of any law, statute, ordinance, regulation, custom or usage of any State of any right, privilege, or immunity secured by the Constitution of the United States," etc.

Facts Admitted.

The cause was disposed of in both the lower Courts upon the Pleadings, that is on the Complaint and on a Motion to Dismiss. Therefore all the facts which are well-pleaded in the verified Complaint are admitted. Accordingly this "Summary Statement" becomes an abbreviated recital of the charges of the Complaint and for that reason frequent references to the Complaint will be necessary.

The Complaint in substance charges that the right of the plaintiffs to vote for Federal Officers at the Presidential and Congressional elections in Illinois to be held on November 7, 1944, has been and will continue to be arbitrarily and totally denied to them, *so far as the Federal Wartime Voting Act of 1944 is concerned*, by the acts or omissions of the defendant, who was and is Governer of the State of Illinois.

Major Theories of Plaintiffs' Complaint.

The complaint below was and is based on two major ideas or legal theories:

First: That the Congress of the United States, acting under its War Powers and under its power and authority over Federal elections (as authorized by two provisions hereafter cited of the Federal Constitution) enacted and put into effect the so-called Federal Wartime Voting Act of 1944. By that Act Congress created

a new and special and particular method of voting, *for Federal Elective Officers, in time of war*, for all members of the armed forces of the United States, who come within the purview of that Act. Specifically it is a franchise to vote, directly under Federal laws, and Federal authorities, for:

A. Electors for President and Vice President of the United States, and

B. Senators and Representatives in Congress.

That under the intent and purpose of Congress, that Act was designed and intended to meet the extraordinary situation created by the unprecedented fact that more than 10 million citizens and voters of the United States were in the armed forces and far removed from their usual places of residence, and therefore unable to vote in the usual and ordinary way; and that the Act, by its title, shows that it was solely an emergency measure designed "to facilitate voting in time of war, by members of the land or naval forces", etc.

Second: That the Federal Declaratory Judgment Act, upon which the Complaint relies for relief, is peculiarly fitted and suited for determining and fixing the rights of these Servicemen to vote under the Federal Wartime Voting Act of 1944, not only in the State of Illinois, but elsewhere throughout the United States.

Because of the sudden and heretofore untried application of this novel method of voting in time of War, grave uncertainties and much confusion has arisen as to the powers and authority and discretion which the said Act has placed upon the Governors of the various States of the Union, and particularly upon the defendant as Governor of the State of Illinois. The Complaint charges (and on argument below it was admitted) that the defendant has publicly announced that as such Governor he has taken an arbitrary and prohibitive attitude and position with respect to the application of the said Act in the State of Illinois; with the result that each of the plaintiffs (as well as more than 300,000 other servicemen and women from the State of Illinois, in the armed forces of the United

States), will, in actual fact, be disfranchised and prevented from voting for all Federal elective officers (so far as the Federal Wartime Voting Act of 1944 is concerned) at the coming Presidential and Congressional elections.

The Brief in support of this petition shows clearly that the Declaratory Judgment Process is well designed and aptly suited for construing and interpreting the rights of voters under election statutes, *in advance for election;* and that it has often been used for that purpose by the courts of many States.

Summary of the Complaint.

Because of the novel nature of the Complaint below, and because of the large public interest in the controversy which it sets forth, we are giving a rather full summary of the pertinent allegations of the Complaint in an Appendix to this Petition. As already stated, *the facts charged in the Complaint,* are admitted. We believe this Court will be better able to get a full and fair understanding of the suit below, and do it easier, from a reading of that Appendix, than if the Court has to read parts or all of the Complaint in the Transcript. Our purpose in this behalf is solely to help the Court.

Main Points of Defense.

The defendant's Motion to Dismiss was based on four principal theories and contentions:

A. That the defendant, since he is Governor of the State of Illinois, cannot be brought to bar of the Federal Courts for any purpose whatever; it is boldly claimed that he is immune to suit in this action.

B. That the suit is somehow "a suit against the State of Illinois," and the action is therefore prohibited by the 11th Amendment.

C. That the State and local election officials in

Illinois are necessary parties defendant, if this action is to be properly heard.

D. That Complaint does not state a cause of action (that is a "controversy") which entitles the Plaintiffs to any relief under the Federal Declaratory Judgment Act.

Prayer for Relief.

The particular attention of this Court is called to the Prayer for Relief sought by these Petitioners. (R. 24-27.) No mandatory or injunctive relief of any kind, against the defendant or any other State Official is either asked or desired. The District Court was asked merely for such *declaratory relief* as would—

> "* * * settle and determine the rights and other legal relations of the plaintiffs," (and the other servicemen similarly situated).

That is all that this Court could properly consider (or would be asked to grant) if this Petition should be granted. But that relief *by way merely of interpretation and construction of this much controverted Act of Congress*, would completely satisfy these Petitioners, and the hundreds of thousands of servicemen from Illinois and other states who are in the same situation with them.

Such relief, by way of an Opinion by this Court, would end once and for all the feeling of discrimination which now exists throughout the entire country; due to the fact that in the same military camp or post, and in the same naval station, or on the same boat, all over the world, men from Illinois will be totally denied (by the War Department and the Navy Department) the right to vote the Federal Ballot, even in the restricted way the Act of Congress authorizes that ballot to be used, whereas men from Indiana and Michigan, and Pennsylvania, and numerous other states will be permitted to use and to vote that ballot, if they so wish. That discrimination, it is implicitly charged in the

Complaint (R. 22) does violence to the Constitution of the United States, as between the citizens of one state and the citizens of other states.

Questions Presented.

The Record here presents the following questions:

1. Is the so-called Federal Ballot, created by the Federal Wartime Voting Act of 1944, "unconstitutional and invalid" in Illinois, as the defendant asserts; or is it a proper and valid method of voting by members of the armed forces so far as authorized by the provisions of that Act of Congress?

2. Is the right to vote under the Act last mentioned dominant over and superior to any conflicting provisions or rules or regulations of Illinois law; or may the defendant be heard to say to the contrary that provisions of Illinois law prevail over that Act of Congress, even as to voting for elective Federal officers?

3. Does the right to vote for Federal elective officers, in time of war, under the Act of Congress last mentioned, depend in any way upon, or grow out of the laws of the State of Illinois?

4. Does the defendant, either as Governor of the State of Illinois, or in any other capacity, have any legal right or authority to decide that the right of members of the armed forces of the United States to vote under the Act of Congress last mentioned is "not in accordance with the laws" of Illinois?

5. Is the defendant, under the allegations of the Complaint in this case, entitled to claim that he is immune from suit in the Federal courts in any action brought by these Petitioners for the general purpose set forth in the Complaint below; or must the defendant not answer at the bar of the Federal courts, even though he be the Governor of the State of Illinois?

Reasons Relied On for Allowance of Writ.

The reasons for the allowance of the writ in this case, we respectfully say, stand out in clear fashion from the Summary Statement given above, and from the matters set forth in the **APPENDIX** at the foot of this Petition.

Over and above that point we say that the "reasons" for the judgment of the District Court and for the affirming judgment of the Court of Appeals have never been stated. We believe that the Petitioners here have the constitutional right to have their claims in this case passed upon in the usual way consistent with American Jurisprudence—that is by a supporting judicial opinion which will state for them their *rights* or non-rights.

Wherefore the Petitioners respectfully pray that this Court grant this Petition for Certiorari for the primary reason that (in the language of Rule 38 of this Court) "*a Circuit Court of Appeals has decided an important question of Federal law, which has not been, but should be, settled by this Court.*"

Respectfully submitted,

URBAN A. LAVERY and

FRANCIS HEISLER,

Attorneys for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Introductory Comment.

Counsel for Petitioners are satisfied that a Brief and Argument, in support of this Petition for Certiorari, in the ordinary legalistic fashion and pattern, would not be helpful to the Court in this case. But by the same token, Counsel believe that some comment, partly legal and partly factual, might be of assistance to the Court. We will accordingly restrict ourselves in this Brief to such commentary as we think is called for in the premises.

Significance of the Case.

If this case is taken by this Court, the prompt decision of it should result, in a practical way, in determining whether several million Service men and women, who are serving overseas in the Armed Forces of the United States, will be permitted to vote at the coming Presidential and Congressional elections in November; or whether, for all practical purposes, they will be disfranchised at that election. That this is not a wild statement or loose charge, we will now try to show by suggesting certain convincing reasons for that proposition.

In the first place, it must be remembered that Congress enacted the Soldiers Voting Act of 1944 (U. S. C. A., Title 50, Secs. 301 *et seq.*) as a War Emergency measure; and provided for the so-called Federal Ballot after long and full discussion. Congress, therefore, must have been convinced that a large proportion of the overseas troops could not vote under the so-called "State Ballot" plan, else Congress would not have acted as it did. In other words, we

have a legislative finding by Congress itself that the use of the Federal Ballot is necessary in the present emergency, if the right of the overseas troops to vote in the coming election is to be adequately provided and protected.

The second consideration is the fact that the so-called "absentee voting laws" of the various States of the Union were, as this Court knows, never designed or intended for the enormous emergency task of providing a means of voting (by individual mail) for several million absent voters who are temporarily in the Armed Forces of the United States and scattered all over the world. Those laws, as the Court knows, are, many of them, rather antiquated legislative provisions, originally designed to permit a relatively small number of civilians to vote by mail, *who are earnest enough to go through the long red tape required to vote.* These State "absentee voting laws" are not in any sensible or realistic sense entitled to be called "Soldier Voting Laws." On the contrary, they are merely a variegated assortment of *peace-time* laws, designed for a very different purpose. In a few States these laws have been tinkered with, recently, in some minor respects, for the purpose of leading the public to believe that they will permit sensible and realistic Soldiers Voting. We say they will not do that; but on the contrary, that these State laws will break down completely when put to the enormous task of trying to provide a method of voting, *by mail,* for 10 or 11 million Wartime Voters. Even in those States like Illinois, where these laws have been recently modernized and simplified, *at least four trans-ocean mail trips* are required before the ballot of the individual soldier finally arrives at the local precinct voting-booth, where it must get before it is counted. We say further, that hundreds of thousands of soldiers' ballots will in a sense, "die aborning," because (like all soldiers' mail at the battle fronts) they will inevitably and

unavoidably be clogged and mislaid and delayed in Company and Regimental headquarters all over the world until it is too late for them to be counted. Any soldier who has ever served over-seas (as both the Counsel for Petitioners have done) knows that this latter unfortunate fact is serious and is true.

The third reason why voting by "State Ballots" will not work with the several million overseas soldiers and sailors, is a psychological reason. Any person who served in the First World War, in France, and indeed, any person who is familiar with the mental processes of a soldier at the front, knows at once that few of them will go through the discouraging red-tape which is unavoidable under the "State Ballot" system, before a ballot can be secured and voted. The soldier at the front whose right to vote requires *four trans-ocean mail trips* before his ballot gets back home will throw the whole thing up in disgust. He simply will not submit to what he thinks is a gross discrimination against him in this matter of voting.

Evidence of the 1942 Election.

Over and above these three convincing reasons, there is a fourth consideration: namely, the clear evidence of Soldiers' Voting in the 1942 Congressional elections. At those elections the State "absentee voting laws" were available in substantially the same form as they are today. There was, however, no Federal ballot permitted at that election. The Census Bureau has published "A Study of Soldiers' Voting" at the Congressional elections two years ago. The result of that study shows that only 28,051 "effective ballots" were received in the entire United States, although at that time there were approximately 2½ million men in uniform and away from their usual places of residence. That means that only 1 per cent, approximately, of the soldiers and sailors who were in the Armed Forces at the time of the Congressional elec-

tions two years ago were able to vote under the so-called "State Ballot" system. These facts were known to Congress when the 1944 Federal Wartime Voting Act was passed.

In Illinois, with which Counsel in this case are most familiar, there were more than 250,000 Service men and women in the Armed Forces at the time of the 1942 Congressional elections. In spite of much effort by public officials and public opinion generally, in Illinois, to get out the vote, there were only 4,447 "effective ballots" received in the entire State of Illinois. That is less than 2 per cent of the vote of the men and women in uniform at the time of that election.

We therefore say that the overseas troops *cannot effectively vote under the "State Ballot" system.* We have had that fact proved under our statute in Illinois. As far as the overseas troops from Illinois are concerned, our State "absentee voting law" has been well called a *"Soldiers can't vote Law."* We therefore say again that the votes of millions of service men and women, overseas, depend on the outcome of this case.

Discrimination as Between States.

One of the best-known provisions of the Fourteenth Amendment is found in Section 1 thereof, which reads as follows:

> "Nor shall any State * * * deny to any person within its jurisdiction the equal protection of the laws."

The Complaint charges, and it is not denied, that about 25 States of the Union have officially taken steps to permit the use of the Federal Ballot. The defendant, as Governor of Illinois, has refused to permit Illinois to join that list of States. Here is a clear discrimination by the State of Illinois which does violence to the spirit, if not

indeed also to the letter, of the above Constitutional provision.

What, then, will be the realistic result of that discrimination in the camps and posts of the Army all over the world and on the ships and in the naval posts of the Navy all over the world? On some particular day before the November, 1944, election, the Commanding Officers of each of those camps and posts and ships and naval stations will announce that Federal Ballots are available for all servicemen desiring to vote them, who are entitled to vote them. On that day the service men, say from Indiana and Michigan and Pennsylvania and Massachusetts, and many other of the leading and progressive States of the Union, will form in line and come to the voting-booths set up for the purpose and receive a Federal Ballot; and after voting it he will turn it back to the voting-officers who have been delegated to collect and return them, in bulk, to the United States War Ballot Commission in Washington, for delivery in turn, to the Secretaries, of State in the various States. (For there is no *voting by mail* under the Federal Wartime Ballot system; on the contrary the Federal Ballots are given to the troops at the front; and after they are voted they are collected and returned home in bulk by the War Department or the Navy Department, as the case may be.)

But when the soldier or sailor from the State of Illinois who will be in line to vote comes before the voting-officer in his particular post or camp or ship, he will be ordered to step out of line, and will be told that he cannot vote the Federal Ballot. If he asks the reason, the voting-officer will have to tell him—

> "The Governor of your State has refused to permit the use of this ballot."

If he investigates the matter further, he will find that the law forbids the Secretary of War or the Secretary of the

Navy (as the case may be) to give him a ballot under those circumstances. Here then is a discrimination between the States that may receive little thought or attention until it actually takes place in hundreds of thousands of instances in the Army and Navy camps and posts all over the world. But if that discrimination is permitted to happen (as it is bound to do if the present state of affairs persists), we predict that much will be heard about it after it has happened, and in the days to come.

The Verdict of History.

In Nocolay and Hay's "*Life of Lincoln*," and in the other authentic history-books about the Civil War, we read about the shameful role which the State of Illinois played in the matter of Soldiers' Voting in 1864. The "Copperhead" legislature of that State (over the objection of a loyal war Governor of that time, and over the objection of a great majority of public opinion in the State) refused to permit Illinois soldiers to vote in the fields and camps of the Army, as was done by other States for their soldiers and sailors. These plaintiffs and their counsel fervently hope that the history-books of the future will not be compelled to record a similar verdict of history, and to say that Illinois in 1944, in the Second World War, followed the footsteps of the "Copperhead" legislature of Illinois in 1864.

The Way of Democracy—Honest Elections.

We say that the way of Democracy is not that way. We say that the American idea of Democracy forbids such discrimination. We say that the Federal Ballot is either legal and valid everywhere, including Illinois, or it is invalid everywhere. The Union cannot be a "house divided against itself" on this point.

We say this honorable Court is the only Forum in which that question can be settled. It is arguable (although we believe it is most unlikely) that this Court might hold the Federal Ballot unconstitutional, as the defendant in this case asserts it is in Illinois. We on behalf of the Petitioners are willing to stand or fall on that proposition. Lincoln said that the Union could not survive "half slave and half free." We use that figure of speech about the Federal Ballot. We say that an honest election, for President and for Congress, cannot be held in November with the Federal Ballot legalized and authorized in half the States (or thereabouts), while that Ballot is rejected and not permitted to be used by millions of Service men and women in the rest of the States.

So much for the larger aspects of this case. We come now to certain particular aspects of it, which we think also deserve some comment.

A Case of Nation-wide Interest.

The case at bar is the first and only case in the entire country (so far) in which the validity and construction of the much-disputed Federal Soldiers Voting Act of 1944 has been submitted to the courts for interpretation, in the usual American fashion. Moreover, we believe that the procedure adopted in the Complaint below (that is, the Declaratory Judgment process), is the only method by which certain disputed questions arising in that Act can be lawfully decided in advance of the elections and in time to be of any real help in administering that Act throughout the country.

The District Court met the issues presented to it in the Complaint by a flat judgment denying its jurisdiction both over the defendant Governor personally and over the subject matter of the Complaint. The Circuit Court of Ap-

peals affirmed that judgment after a summary hearing and oral argument, but did so "without opinion." By so doing the latter court expedited the case on its way to a possible hearing before this Court at a time when a few days saved might be highly desirable. Nevertheless, the practical result is that the bar of the country, and, indeed, those who are charged with administering this important Act of Congress, are entirely without any judicial opinion in this case as to the validity or the construction of that Act. We submit, therefore, that a decision by this Court in the premises is highly desirable, not only to the 10 or 12 million Service men and women who will be affected by it, but also to the nation as a whole.

The Question of the Constitutionality.

Counsel for the defendant (the Attorney General of Illinois), in his argument both in the District Court and in the Circuit Court of Appeals, frankly based his moral defense of the attitude and conduct of the defendant Governor in this case on the bald contention that the Federal Ballot was "unconstitutional and invalid" in Illinois, and that its use was "expressly prohibited" by the laws of that State. (See also the express statements of counsel for the defendant to that effect in "Opinions of the Attorney General of Illinois," June 13, 1944, addressed to Governor Dwight H. Green, entitled, *Voting by Persons in the Military Service.*)

We accepted that challenge in our argument in the District Court and in the Circuit Court of Appeals, and respectfully say that such will be the major question before this Court if this Petition is allowed. The fact is that the Complaint below was chiefly bottomed on that particular legal issue of constitutionality.

When we strip the arguments presented in this case,

pro and *con*, of all their nonessentials, one question is boldly posed by the Complaint, namely: Can the defendant, even as Governor of Illinois, by a mere *fiat* declaration, say that the Federal Soldiers Voting Act is unacceptable and invalid in that State, and thereby deprive more than 300,000 Illinois citizens of the right to use and vote the Federal Ballot, on his mere *ipsi dixit* that the use of such ballot is "unconstitutional" when the use of that ballot has been and will be permitted and authorized in more than 25 other States of the Union?

When Congress saw fit to pass that Act and stated in its title that the Act was designed "to facilitate voting in time of war," Congress gave a clear intention to assist the members of the armed forces of the United States in their difficult tasks of voting in all Federal elections. Since the question of the right to vote can, of itself, not be challenged, the only question which is here open is this: Does the method provided by Congress "to facilitate voting in time of war" actually achieve that purpose, and is that purpose consistent with the provisions of the Federal Constitution?

The Matter of Time.

When the plaintiffs below asked the Federal Courts below to decide that question, there was ample time to have it decided in advance of the election, in a fashion that would be helpful to all those concerned with the Act. The fact is that the War Department and the Navy Department have already printed and provided several million Federal Ballots and have actually distributed such ballots in bulk to the commanding officers of the Army and Navy in all parts of the world. Those Federal Ballots would be instantly available for distribution and voting—even by those members of the armed forces, such as the citizens of Illinois, who down to this time have been denied the use of the

Federal Ballots. *They could vote that Ballot, even overseas, as late as say the forepart of October, and it still would be returned in time to be counted on November 7, 1944.*

We respectfully say, therefore, that a decision by this Court, during the early part of the October term, if it upheld the validity and constitutionality of the Federal Ballot, would instantly release those ballots for voting all over the world for Illinois servicemen (as well as similarly situated servicemen from other States) who desire to vote the Federal Ballot and who had not been able to vote the so-called State Ballot.

The Effect of Constitutionality or Unconstitutionality.

We therefore respectfully ask this Court to say in clear and unambiguous language whether the so-called Federal Ballot is, or is not, Constitutional. There can be only two answers, Yes or No, to that question. We wish to analyze, in summary fashion, the effect of both of those answers, which we now do.

A. If this Court should declare that the Federal Ballot is Constitutional in Illinois, the effect would be (obviously) to validate the use of the Federal Ballot everywhere, regardless of the State from which a particular service man might come.

The defendant here, in his Reply-telegram to the President (Tr. 30) and in his argument in this case, challenges the validity of the Federal Ballot, and its usefulness, in Illinois. Thereby the defendant takes the position that an Act of Congress, passed for the War Emergency, which has been accepted and recognized as valid and Constitutional in at least 25 States of the Union, may be disavowed and held to be "unconstitutional" and nugatory, in a particular State, *and by the mere fiat of a State Governor.*

It appears to us as elementary that such a conflict between the States of the Union cannot justly and lawfully be permitted to exist, or to continue. A valid Federal statute remains constitutional, and becomes

"the law of the land" in spite of the opinion to the contrary of a State Officer who happens to be a State Governor. The discrimination as to voting rights in the various States which now exists under this Act of Congress is unprecedented in the entire history of the United States. If permitted to continue, and to spread, that discrimination, affecting as it is bound to do, several million American citizens, in the Armed Forces, is sure to result in, and to produce, a National Scandal of serious proportions.

There is surely no precedent in the history of the United States for such a proposition or such a situation. It cannot be that public opinion (and the judgment of fair and reasonable men) has so far realized or comprehended the foreboding social and political results that are bound to follow in the wake of such serious and widespread discrimination over the right to vote for President and Members of Congress. We conclude this point by quoting the classic words of Cicero when in a situation not entirely without pertinency here, he said, *"O Tempora! O Mores!"*

B. But for the sake of argument, let us assume (contrary to our convictions and our expectations) that this Court might hold the Federal Wartime Voting Act of 1944 (or some major provisions of it) to be unconstitutional, thereby prohibiting the use of the Federal Ballot for the citizens of all the States, everywhere in the world. Could this defendant, in such event, conceivably reverse his own opinion, and declare the Federal Ballot valid and proper in the State of Illinois? If that proposition sounds absurd, it is no more so than the converse of that proposition—which is the main contention of the defendant in this case.

The fact is, of course, that since this controversy (and this widespread discrimination) has now become nation-wide, and threatens to range State against State, in this grave matter of soldiers voting, there is only one way in which these conflicting theories and ideas can be made uniform and reconciled, one with the other. That way is by a final decision of this Court. If this Court should hold the

Federal Ballot valid and proper in the State of Illinois, this defendant, we strongly believe, will gladly and faithfully abide by that decision. And the Governors of the other States who have taken sides with the defendant will do likewise.

We therefore respectfully say this Court should allow this Petition and take this case for emergency hearing and disposition at an early date.

The Role of Counsel for Petitioners.

Counsel for Petitioners are presenting this case not solely on behalf of the rights of their individual clients; but also on behalf of the several million American citizens, in the Armed Forces of the United States, who likewise have been adversely affected by the things charged in the Complaint below. Counsel seek to present these important questions to the Court in a *pro bono publico* capacity. They feel that in so doing they have performed, in some slight measure, a civic duty.

And now having presented the matter to the Court to the best of their abilities, they will leave the matter to the Court.

Respectfully submitted,

URBAN A. LAVERY and
FRANCIS HEISLER,
Attorneys for Petitioners.

APPENDIX.

We give in this Appendix a summarized statement of the pertinent allegations of the Complaint. In that fashion we believe we will be better able to present the gist of this controversy to the Court than if the Court has to dig these matters out of the Transcript unaided by Counsel.

Four Specific Statutory and Constitutional Provisions.

The petitioners in their Complaint below, rely on four separate and specific Federal statutory and constitutional provisions. First and foremost is the Federal Wartime Voting Act of 1944, already cited. That Act, of course, is the Magna Charta of Soldiers' Voting in Wartime. The purpose and design and intent of Congress in passing that Act is expressed in its Title in the following language:

Act of 1944.

> "An Act to facilitate voting, in time of war, by members of the land and naval forces, members of the merchant marine, and others, absent from the place of their residence, and to amend the Act of September 16, 1942, and for other purposes."

Section 1 of that Act contains an express Federal grant of the franchise or right to vote for all elective officers of the United States in the following language:

> "Sec. 1. In time of war, notwithstanding any provision of State law relating to the registration of qualified voters, every individual absent from the place of his residence and serving in the land or naval forces of the United States, including the members of the Army Nurse Corps, the Navy Nurse Corps, the Women's Navy Reserve, and the Women's Army Corps, who is or was eligible to register for and is qualified to vote at any election under the law of the State of his resi-

> dence, shall be entitled, as provided in this chapter, to vote for electors of President and Vice President of the United States, United States Senators, and Representatives in Congress."

The Complaint then sets forth (as a sort of "Counter-irritant" against the idea that "States' Rights" have somehow been impinged upon by that Act) a specific provision of the 1944 Act of Congress, under which the right of any person to vote the so-called "State Ballot", provided for by the laws of his State, is fully reserved and guaranteed. (R. 8.) That provision (set out in the Complaint) reads as follows:

> "Sec. 3. Nothing in this Act shall be deemed to restrict the right of any member of the armed forces of the United States, or of any other person, to vote in accordance with the law of the State of his residence."

In summary of this point of the right to vote under the Federal Wartime Voting Act of 1944 the Complaint charges that that Act

> "was intended by the Congress of the United States to be, and it is, a complete and self-contained charter or grant of the right of suffrage under the Government of the United States, *so far as the elective officers of the United States only are concerned.*" (R. 8.)

Selective Service Act of 1940.

The second statutory provision on which petitioners rely is a specific provision which Congress wrote into the so-called Selective Service Act of 1940. (U. S. C. A., Title 50, Appendix, Sections 301, *et seq.*) That Act under which more than 10 million servicemen have been drafted into the armed forces, likewise contains a specific guaranty of the right to vote for all Federal officers at all elections; since it specifically provides in Section 8 that all persons inducted under that Act into the armed forces of the United States

"shall, during the period of said training service, be permitted to vote in person or by absentee ballot in any general, special, or primary election occurring in the State of which he is a resident, whether he is within or outside of such State at the time of such election." (R. 9.)

The Complaint accordingly charges that this provision of this earlier Act of Congress was likewise intended by Congress as a guaranty that all persons summoned into the armed forces during the emergency of the war would not suffer thereby, or be restricted or hampered in their normal right to vote at all elections. (R. 10.)

Constitutional Provision as to Senators and Representatives.

The first Constitutional provision which the Petitioners charge has been violated by the defendant is found in the following language of Article I, Section 4 of the Federal Constitution:

"The times, places and manner of holding elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators." (R. 10.)

The Complaint specifically charges that "the right of Congress to regulate" voting for all Federal elective officers—

"• • • is guaranteed in the first instance and most fundamentally, so far as United States Senators and Representatives in Congress are concerned" (R. 10), by the above-quoted Constitutional provision. And that thereby the right to vote of all Service men to vote for Federal elective officers "is guaranteed to them (by the Constitution itself) over and above the provisions of the Federal Wartime Voting Act of 1944, and the Selective Service Act of 1940, as respectively above set forth." (R. 11.)

Constitutional Provision as to Federal Electors.

The second Constitutional provision which the Petitioners charge has been violated by the defendant has to do with the right to vote for Electors for President and Vice President of the United States. Section 2 of the 14th Amendment specifically recognizes and guarantees the right of popular election for such officers by the force of the following language:

> "* * * the right to vote at any election for the choice of Electors for President and Vice-President of the United States, [Senators] and Representatives in Congress * * * [shall not be] denied * * * or in any way abridged."

The Complaint accordingly charges that—

> "Such right to vote, and the right of Congress to regulate the same is guaranteed in the first instance and most predominantly, so far as Electors for President and Vice President are concerned by the language of [that] Section." (R. 11.)

And the Complaint further charges that Congress is given specific power to regulate and enforce the right to vote for Electors for President and Vice President by the additional language of Section 5 of the 14th Amendment, which provides that—

> "The Congress shall have power to enforce by appropriate legislation the provisions of this Article." (R. 11.)

Summary as to Federal Right to Vote.

Such, then, is the four-ply guarantee of the right to vote which the Complaint sets out as being guaranteed by the Federal Government to these plaintiffs, and all other persons similarly situated, in the Armed Forces of the United States during the emergency of the present global War.

Federal Duties Imposed on State Governors.

The Complaint then sets out (R. 13) that Section 302 of the Federal Wartime Voting Act of 1944 purports (among other things) to give the Governors of the various States of the Union certain powers and authority, *concerning the use or non-use,* in any such State of the so-called "Official Federal War Ballots" provided for by that Act. The effect of this provision is to give to one individual in each State of the Union, to wit, the Governor of that State, the power to say whether this Act of Congress, guaranteeing the right to vote to members of *the Armed forces of the United States,* shall become effective in that State or shall be totally denied and repudiated in that State. The Complaint charges (R. 22) that at the time it was filed (June 24, 1944) approximately twenty-five States of the Union had expressly taken action to validate and authorize the use of the so-called Federal War Ballots in those States; but that the defendant, purporting to act as Governor of Illinois,

> "has prevented and blocked the Official Federal War Ballots from being officially recognized and accepted in the State of Illinois, and from being delivered *to any person whatsoever from that State,* at the election to be held on November 7, 1944." (R. 22.)

The Complaint charges that the defendant has refused to permit the use of the Federal Ballot in Illinois, notwithstanding the fact that under Section 303 of the Act of Congress of 1944, no Serviceman from the State of Illinois will get or will be given, by his superior officers, the Federal Ballot, unless (after October 1, 1944) he takes an oath that he has tried to get a "State Ballot," under the laws of Illinois, and has been unable to get that ballot. (R. 23.)

The provisions of the 1944 Act of Congress purporting to delegate such discretion and authority to the Governors of

the various States are set forth in the Complaint (R. 13), and are as follows:

"APPLICATION OF THIS TITLE.

SEC. 302. (a) Subject to the provisions of subsection (b), the provisions of this title shall apply with respect to the following:

(1) Members of the armed forces and the merchant marine of the United States, outside the United States.

(2) Persons serving with the American Red Cross, the Society of Friends, the Women's Auxiliary Service Pilots, and the United Service Organization, outside the United States who are attached to and serving with the armed forces of the United States.

(3) Members of the armed forces, inside the United States.

(b) The provisions of this title shall apply to, and the ballot provided for by this title may be used by—

(1) an individual referred to in paragraph (1), (2), or (3) of subsection (a), if he is a citizen of a State whose Governor has certified, prior to July 15 of the year in which the election is to be held, (A) that such State has made no provision for procedure which will enable the citizens thereof to whom subsection (a) applies to vote by State absentee ballot, and (B) that the use of ballots provided for by this title is authorized by the laws of such State; or

(2) an individual referred to in paragraph (1) or (2) of subsection (a), if he is a citizen of a State whose Governor has certified, prior to July 15 of the year in which the election is to be held, that the use of ballots provided for by this title is authorized by the laws of such State, even though the Governor thereof does not make the certification referred to in clause (A) of paragraph (1), but only if such individual states in his oath that, prior to September 1, he made application for a State absentee ballot but, as of October 1, has not received it.

No individual who is not included under paragraph (1) or (2) of this subsection shall be entitled to use, or be furnished, a ballot under this title. Certifications referred to in this subsection shall be made to the Commission."

Defendant's Repudiation of Soldiers Voting Act.

The Complaint sets out (R. 29) the telegram of the President of the United States of March 15, 1944, asking the defendant in this case about his official attitude, as Governor of Illinois, as to the "Soldiers' Voting Bill"; and also sets out the reply of the defendant, of March 17, 1944, in which the defendant said among other things (R. 30):

> "The use of a supplementary Federal Ballot is not now authorized by the laws of our State * * * and it would not be in the interests of those in the Armed Forces from our State for Illinois to adopt the Federal law."

The Complaint sets out that the response of the defendant shows his repudiation and rejection of the Federal Wartime Voting Act for the entire State of Illinois. (R. 20.) The Complaint further charges that the defendant's reply to the President, when read with the charges in the Complaint clearly shows "the existence and extent of the actual controversy" which exists in the State of Illinois, such as justifies the Plaintiffs in their efforts to seek relief under the Federal Declaratory Judgment Act. (R. 20.)

The Practical Result in the States.

The practical result of the enactment of the 1944 Act of Congress, and of the defendant's action, or inaction thereunder, as charged in the Complaint is that—

> "More than 25 States (as of June 15, 1944) have taken [such] official steps and action * * * that the Official Federal War Ballots will be recognized and ac-

cepted in those States * * * and that by July 15, 1944, a very great majority of the States of the Union will have done likewise.

[But that] the defendant * * * has so far prevented and blocked the State of Illinois from ranging itself on the side of the other States above mentioned and described. (R. 22.)

* * * And by such arbitrary and illegal acts and doings, whether by omission or commission, the defendant will be able, illegally and without any valid right or authority whatsoever to disfranchise and prevent from voting at the said election of these plaintiffs (and all the other 30,000 and more qualified electors in Illinois similarly situated to them as above set forth) so far as the use of the Official Federal War Ballots is concerned * * * unless [the plaintiffs are granted relief] in accordance with the prayer of this Complaint."

Authority of Federal Courts.

The Complaint sets out that under the provision of the Act of Congress last above quoted

"the said defendant is made, *ex officio and pro tanto* an officer of the United States (and not of the State of Illinois) to the extent and for the purpose and with the powers and authority last above set forth." (R. 14)

and that by reason of the premises, all authority and discretion and power of the defendant, comes from and is granted to and imposed upon the defendant by the Federal Government; and that accordingly, such authority, discretion and power so granted to the defendant may be properly and lawfully construed and interpreted by the Federal Courts under the Federal Declaratory Judgment Act.

Official Federal War Ballot.

The Complaint sets out the provisions in the Federal Wartime Voting Act of 1944 which authorized and guaranteed and established the so-called "Official Federal War

Ballot'' and the form of that ballot is set out in full in the Complaint. (R. 15.)

The Complaint then states (R. 17) that under the provisions of the Federal Wartime Voting Act of 1944 (and under the rules and regulations with respect to said Act which have been set up and established by the Federal Authorities), *no Federal Ballots whatever will be given to or will be delivered to any member of the Armed Forces coming from Illinois,* of whom there are more than 300,000, unless and until the defendant shall file with the United States War Ballot Commission a ''certificate'' authorizing the use of such Federal Ballots at elections in the State of Illinois.

Disfranchisement of 300,000 Servicemen.

The allegations of the sworn Complaint conclude with the charge that:

> ''By reason of the matters and things charged in this Complaint, and specifically by reason of the arbitrary and illegal acts of the defendant, *ex officio,* as Governor of the State of Illinois therein described, these plaintiffs, (and all of the other 300,000 persons, or thereabouts, similarly situated to them as hereinbefore described, who will be lawfully entitled to vote in the State of Illinois on November 7, 1944) will be entirely disfranchised, and denied the right to vote, so far as their right to vote *for the elective Officers of the United States,* under the Constitution and Laws of the United States, and particularly under the so-called Federal Wartime Voting Act of 1944, is concerned, unless this Honorable Court shall come to the aid of these plaintiffs in the particulars asked for in the Prayer of this Complaint.'' (R. 24.)

Even in the oral argument, in the District Court, and in the Circuit Court of Appeals, there was no dispute of the realistic facts above charged.

Prayer for Relief.

In drafting the Prayer for Relief of the Complaint, counsel had in mind the well-known and proper reluctance of the Federal Courts to interfere, *coercively,* with the functions of a State Governor. Accordingly the relief asked in no way calls upon the Courts to take such action. The prayer in general terms asks the Court, by declaratory judgment, proceed to settle and determine "the rights and other legal relations" of the plaintiffs and all the other persons in the armed forces similarly situated. In particular the prayer (R. 24-27) asks the Court to order and decree (in substance)—

A. That Title III of the Act of 1944, which provides for the Federal Ballot and its distribution, etc., is constitutional and valid.

B. That the right to vote granted by that Act "is dominant over and superior to" the laws of any State, so far as voting for Federal Officers are concerned.

C. That the right to vote the Federal Ballot grows out of Federal law, and cannot be limited or restricted by any State law, or any State action.

D. That so far as the laws of Illinois have any application to the Federal Ballot, they authorize and permit its use.

E. That it is the *legal duty* of the defendant as Governor of Illinois to recognize the Federal Ballot and authorize its use in that State.

Finally it is prayed that if the defendant fails to file in Washington the "Certificate" mentioned in the 1944 Act, that the Courts hold and declare that all service men in Illinois may nevertheless use and vote the Federal Ballot, in accordance with law, notwithstanding such failure of the defendant. (R. 26.)

There is also the usual prayer for "such other and further relief" as the Court sees fit to grant. (R. 27.)

Defendant's Motion to Dismiss.

The motion of the defendant to dismiss the cause need not be summarized here. The Court will wish to read the defendants' pleading verbatim. (R. 38 to 40.)

The "Opinion" of the Reviewing Court.

In the ordinary case of a Petition for Certiorari to the Circuit Court of Appeals, the Supreme Court has the benefit and information that comes from a reading of the Opinion of the Court of Appeals. In this instance however that Court affirmed the judgment of the District Court by a summary, and "*Per Curiam*" memorandum, which specifically stated that such action was taken "without opinion." (R. 68.)

An "Abstract" of the Transcript.

It has been our purpose, in this Appendix, to give the Court what might be fairly called an "Abstract" of the Record below, particularly of the allegations of the complaint.

We hope this "Abstract" will be found to be helpful and informative to the Court.

AUG 26 1944
CHARLES ELMORE CROPLEY
CLERK

(2)

No. 398

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

LIEUT. WILLIAM DOWNEY, U. S. A., ET AL.,
Petitioners,

vs.

THE HON. DWIGHT H. GREEN, EX OFFICIO IN THE CAPACITY HEREINAFTER DESIGNATED,
Respondent.

EMERGENCY MOTIONS.

URBAN A. LAVERY and
FRANCIS HEISLER,
Attorneys for Petitioners, and Movers hereof.

THE GUNTHORP-WARREN PRINTING COMPANY, 210 WEST JACKSON, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1944.

LIEUT. WILLIAM DOWNEY, U. S. A., ET AL.,
Petitioners,

vs.

THE HON. DWIGHT H. GREEN, EX OFFICIO IN THE CAPACITY HEREINAFTER DESIGNATED,
Respondent.

EMERGENCY MOTIONS.

Come now the Petitioners herein by Urban A. Lavery and Francis Heisler, their attorneys, and respectfully and prayerfully present the following Motions.

I.

Motion as to Emergency Consideration of Petition.

Counsel for Petitioners respectfully ask that the Petition for Certiorari filed herein be taken by this Court for consideration and disposition as an emergency matter, in vacation time; and in support of such motion counsel submit the attached Affidavit of Urban A. Lavery, one of the attorneys for the Petitioners herein.

II.

Motion to Advance Cause.

Comes now the Petitioners herein by Urban A. Lavery and Francis Heisler, their attorneys (but only on the condition that the Petition for Certiorari heretofore filed herein shall have been granted by this Court), and in that event counsel present the following Motion:

The said Petitioners respectfully ask this Court to consider advancing this cause for prompt hearing and disposition as an emergency matter, so that it may be decided in apt time; and in support of that Motion counsel submit the attached Affidavit of Urban A. Lavery, one of the attorneys for the Petitioners herein. Urban A. Lavery, and Francis Heisler Attorneys for Petitioners Movers hereof.

Supporting Affidavit.

Comes now URBAN A. LAVERY, who says upon oath that he is a member of the bar of the State of Illinois and a member of the bar of the Supreme Court of the United States, and is one of the attorneys for the petitioners herein, and that as such attorney, he is duly authorized to make this Affidavit. And thereupon affiant states:

1. This Affidavit is made in support of the foregoing Motion as to Emergency Consideration of the Petition for Certiorari heretofore filed herein; and also in support of the foregoing Motion to Advance This Cause.

2. That this Cause involves a matter of large and urgent public importance in that it concerns (as charged in the Complaint below) the right to vote of at least 300,000 members of the Armed Forces of the United States who are residents of and qualified voters in the State of Illinois, at the Presidential and Congressional elections to be held in the said state on November 7, 1944.

3. That this Cause in this Court particularly involves the construction of:

(a) the Act of Congress passed in March 1944, having to do with voting under the so-called Federal Ballot by the Armed Forces of the United States; and

(b) the interpretation and construction (and application to this suit) of the so-called Federal Declaratory Judgment Act. The particular provision of the so-called Federal Soldier's Voting Act of 1944 which is involved in this case is a provision of that Act giving certain powers and duties under that Act of Congress to the Respondent with respect to the authorizing and validating by him of the use of Federal Ballots in the State of Illinois at the election last mentioned.

4. That (as shown by the verified Complaint of the Plaintiffs below, and by the Motion to Dismiss and by the Briefs filed by the Defendant below) the Respondent admits that he has failed and refused to file the necessary statutory Certificate under the said Federal Soldiers' Voting Act, which Certificate is necessary to be filed under that Act before any soldier or sailor of the State of Illinois can vote the Federal Ballot in that state; the Respondent asserting and contending, as a reason for his refusal to file such Certificate, that the so-called Federal Ballots as authorized by the Federal Soldiers' Voting Act of 1944 are "unconstitutional and invalid" everywhere in the State of Illinois; the Respondent making such contention and refusing to file such Certificate notwithstanding the passage by Congress of the said Soldiers' Voting Act authorizing the use of the said Federal Ballot, and notwithstanding certain provisions of the Federal Constitution which, Petitioners claim, guarantee to them and to all other members of the Armed Forces of the United States the right to use and vote such Federal Ballots.

5. That it is desirable in the public interest to have a prompt and early decision and determination of this Cause

by this Court, in order that the Respondent and the other public officials in the State of Illinois concerned with the conduct of elections (as well as the public generally) may be guided and advised thereby; and also, in order that the 300,000 or more voters from the State of Illinois, now serving in the Armed Forces of the United States outside the United States, who come within the provisions of the said Federal Soldiers' Voting Act, may at the earliest possible date know and understand, and have judicially established for them, their rights and privileges with respect to voting in the State of Illinois under the said Soldiers' Voting Act of 1944 at the November, 1944, elections last mentioned.

6. That, if at all possible, it is desirable in the public interest that the legal controversies and questions above suggested be finally considered and passed upon, and construed and interpreted, by this Honorable Court a substantial time before November 7, 1944; that the Petitioners, and all the numerous other members of the Armed Forces who are similarly situated to them in the State of Illinois, and elsewhere, are particularly desirous (if it is possible) to have such interpretation and construction by this Court; and that a final judicial determination of the legal issues in this case by this Court (if that is at all possible) would be of large public interest in the other states of the Union outside of the State of Illinois.

7. That for the information of this Court on these Motions Petitioners further respectfully show that under the terms of the Federal Soldiers' Voting Act of 1944 it is provided:

> (a) that no soldier or sailor any place in the world may vote the so-called Federal Ballot unless at the time he applies for it he signs an affidavit stating that as of September 1, 1944 he has applied for the so-called "State Ballot" (that is the ordinary ballot used in his home precinct) and as of October 1, 1944 he has been unable to get such a State Ballot.

(b) that no soldier or sailor from the State of Illinois can get and use a Federal Ballot or have it delivered to him by the War Department or Navy Department unless and until the Respondent shall have filed in Washington, D. C. the "Certificate" above mentioned.

And that by reason of the matters stated in paragraphs (a) and (b) above, and the refusal of the Respondent to act as above recited, more than 300,000 soldiers and sailors from the State of Illinois, now in the Armed Forces of the United States, who are qualified electors at the said election, will be entirely deprived of the privilege of using and voting the said Federal Ballot provided for under the said Federal Soldiers' Voting Act of 1944, at the elections last mentioned.

8. Affiant respectfully suggests that if this honorable Court should grant this Petition for Certiorari, and thereafter advance this cause for emergency hearing and disposition, there would be apt time for a decision and opinion of this Court to become effective in the premises. And in that behalf Affiant, on information and belief, respectfully informs the Court that:

A. The so-called Federal Ballots provided for in the Federal Wartime Voting Act of 1944 have already been prepared and printed by the War Department and the Navy Department, in sufficient quantities and moreover have been forwarded and transported in bulk to the Army and Navy Posts and Commands and Stations and Ships throughout the world; and even now are ready (in most places) for distribution to the Armed Forces; and the said Ballots will be, and are, available for the use of the over-seas Forces, from Illinois and all other States, at all such places, from this time down until the Election of November 7, 1944.

B. That after the said Ballots have been voted by the individual members of the Armed Forces, the voted Ballots will be promptly picked up and transported

by the War Department or the Navy Department, as the case may be, by preferred transportation back to the Secretaries of States of the various States, for distribution to the proper local election officials in those States; and that such transportation of the said Federal Ballots will therefore be much quicker and prompter and more efficient than *the individual mail delivery* required for voting under the so-called "State-Ballot" Method.

C. That a *favorable* decision by this honorable Court (if that should occur) as to the validity and constitutionality of the so-called Federal Ballot, rendered, say by the middle of the month of October, 1944, would at once result in the release and distribution of more than 250,000 Federal Ballots to all Service men and women from the State of Illinois in all parts of the world; (and would do likewise for an even larger number of Service men in other States where such Federal Ballots are held back for the same reason as in Illinois); and would permit all such persons to vote and return their Federal Ballots in apt time so that they could be counted and tallied in the Presidential and Congressional elections of November 7, 1944.

All of which is respectfully submitted in support of the foregoing motions.

URBAN A. LAVERY,
One of the Attorneys for Petitioners Herein.

STATE OF ILLINOIS, }
COUNTY OF COOK. } ss.

URBAN A. LAVERY, being first duly sworn, says that he has read the foregoing Affidavit by him subscribed and that the same is true to the best of his knowledge and belief.

URBAN A. LAVERY.

Subscribed and sworn to before me a Notary Public in and for the County of Cook and State of Illinois this 24th day of August, 1944.

DAOLA SMITH,
Notary Public.

(SEAL)

(3)

SEP 15 1944

CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 398

LIEUT. WILLIAM DOWNEY, U. S. A., ET AL.,
Petitioners,

vs.

THE HON. DWIGHT H. GREEN, EX OFFICIO IN THE CAPACITY HEREINAFTER DESIGNATED,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF RESPONDENT DWIGHT H. GREEN IN OPPOSITION TO THE PETITIONER'S PETITION FOR WRIT OF CERTIORARI.

GEORGE F. BARRETT,
Attorney General of the State of Illinois,
Attorney for Respondent.

WILLIAM C. WINES,
Assistant Attorney General,
Of Counsel.

THE BUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO 56

SUBJECT INDEX.

Summary of Argument.

The defendant contends that, since only jurisdictional questions were presented to the lower courts, only jurisdictional questions are before this court. Although this court may, in its discretion, review points actually presented but not passed upon by lower courts, it may not properly review questions which were not even presented on the pleadings below.

The defendant contends that the suit is in effect one against the State of Illinois and is forbidden by the doctrine of sovereign immunity.

But if it is suggested that the suit is not against the State of Illinois and that the Governor does not represent the state, then the suit should be dismissed because, although the suit is one to affect action of the state government, the state government is not represented and has had no chance to be heard. Therefore the court lacks jurisdiction because of the absence of indispensable parties.

It is contended that, if a declaratory judgment would be binding upon the state, the suit offends Illinois' *immunity;* but if such judgment would not be binding, then it would be merely hortatory and there is "no case or controversy."

Although the defendant earnestly maintains that this court cannot decide the plaintiffs' question of election law, since that question was not before the lower courts upon objection going purely to jurisdiction, nevertheless the defendant contends that, if this court can pass upon the merits, it should hold that it is the unmistakable intent of Congress that the Governor's certification, and not a judicial judgment or decree in lieu of such certification, is a prerequisite to the use of the soldiers' ballots in the State of Illinois.

List of Authorities Cited.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No.

LIEUT. WILLIAM DOWNEY, U. S. A., ET AL.,
Petitioners,

vs.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REFERENCE TO JUDGMENT OF THE DISTRICT COURT AND JUDGMENTS OF THE DISTRICT COURT AND THE CIRCUIT COURT OF APPEALS.

Neither the District Court's opinion and judgment nor the memorandum opinion and judgment of the Circuit Court of Appeals has been officially reported. The judgment of the District Court, which dismissed the suit at the plaintiffs' cost, will be found at page 45 of the transcript. The memorandum opinion of the Circuit Court of Appeals will be found at page 68 of the transcript and, since it is only eleven lines long, is reprinted in the margin here for the immediate convenience of this court.[1]

1. "*Per Curiam.* The complaint seeks a declaratory judgment (under Title 28, Sec. 400, U. S. C. A.) to determine plaintiffs' rights under the Federal War-time Voting Act of 1944. 50 U. S. C. A. Sec. 301, *et seq.*
"The defendant entered a special appearance and moved to dismiss the alleged cause of action for lack of jurisdiction ever both the defendant and the subject matter of the complaint. The Court sustained the motion and dismissed the complaint, and from that ruling this appeal is prosecuted.
"The judgment is affirmed without opinion."

STATEMENT OF THE CASE.

The plaintiffs, three men in the armed forces of the United States, sought by this proceeding, which asserted federal jurisdiction over the cause as a civil rights case under the declaratory judgment act, to elicit a pronouncement by the District Court to the effect that (1) Title 3 of the Federal War-time Voting Act of 1944 [2] was valid and constitutional, (2) that the act grants a right to vote which is superior to any right to vote granted by any laws of Illinois and that such right to use and to vote such ballots in no way depends upon the laws of Illinois, (3) that the use of the official Federal War-time ballots for which the act provides is authorized by the laws of the State of Illinois in so far as the laws of that state have any application to the use of Federal War-time ballots, (4) that it is the duty and obligation of the defendant, "*ex officio* and as Governor of the State of Illinois," forthwith and without further delay, to certify to the United States War-time Ballot Commission that the use of the said official Federal War-time ballot is authorized by the laws of the State of Illinois at the election last mentioned, (5) that the requirements of such certification be made "prior to July 15th of the year in which the election is to be held" is not mandatory, and (6) finally, that if the Governor fails and refuses to make such certification, or if he attempts to certify that the use of such ballot is not authorized by the laws of Illinois, then the official Federal War-time ballots "shall be valid and lawful in the State of Illinois" for the coming Presidential and Congressional elections notwithstanding the Governor's failure to certify. (Tr. 25-27.)

2. Public Law 277, Chap. 150, Laws of the 78th Congress, 2nd Session.

The defendant filed a special, limited and restricted appearance (Tr. 37) and his motion, under such special appearance, to dismiss the cause for want of jurisdiction. By this motion, the defendant asserted in substance that:

(1) The suit seeks and contemplates an adjudication which, if such an adjudication could be entered and given effect, would "affect, determine, decide, conclude or adjudicate a question directly affecting, relating to and governing an election to be held in the State of Illinois;" and that, therefore, the suit is, in substance and essential virtue, one against the State.

(2) The suit seeks a declaration or adjudication that would be void unless it were binding not only upon the defendant but upon all persons authorized or directed by law to issue, receive, count, tabulate the result of counting and otherwise deal with ballots cast or sought to be cast in the coming elections; such persons would not be bound by an adjudication against the defendant; and therefore jurisdiction is lacking because of the absence of indispensable parties.

(3) The subject matter of the cause does not constitute a case or controversy within the provisions of the Constitution of the United States authorizing the conferment of jurisdiction upon Federal courts over cases and controversies at law or in equity.

(4) The Governor of the State of Illinois is immune to suits or judicial process having for their object either the actual compulsion of the performance of supposed duties resting upon him, either as Governor or in any capacity, *ex officio*, appertaining to the office of Governor, or for the purpose of usurping his functions as such Governor under the pretext of determining what he should or ought to do.

(5) The right to vote cannot be protected or enforced by any proceeding known to law or equity. Therefore

Congress neither intended to nor could confer jurisdiction upon federal courts to determine such rights by declaratory judgment; for aside from the fact that proceedings seeking a moot pronouncement as to the right do not embody a case or controversy at all, they certainly do not embody a case or controversy "known to the common law or equity."

Although the plaintiffs seek to litigate in this court substantive merits of their contention that the congressional act in question confers a right upon the plaintiffs and other service men from Illinois which is not dependent upon either legislative or gubernatorial action, the only issues precipitated by the defendant's pleadings and the only questions before the lower courts or before this court are the jurisdictional questions relating to whether the Governor is amenable to a declaratory judgment in this case.

ARGUMENT.

(A SUMMARY OF ARGUMENT APPEARS IMMEDIATELY FOLLOWING THE INDEX.)

INTRODUCTION.

The entire petition and brief of the plaintiffs are addressed to what their counsel conceive to be a substantive question of the right of persons in military service to vote at the coming elections.

But the only points raised by the defendant's motion to dismiss, which was presented upon special and limited appearance, were that the court lacked jurisdiction of the subject matter and of the parties for the reasons summarized in the foregoing Statement of the Case and hereafter considered. These points asserted the defendant's contentions, *first*, that, notwithstanding the plaintiffs' protestations to the contrary, this proceeding is in substance and essential virtue a suit against the State of Illinois, *second*, that since the suit affects Illinois elections, the officials sought to be bound by the judgment must be made parties to the suit, it being impossible to regard the Governor as representing the state government for the purpose of dispensing with election officials as parties and at the same time regard him as **not** representing the state government for the purpose of holding the suit to be one not against the state and its government, and *third*, that, apart from all questions of state immunity, the rights sought to be asserted are not those which could be the subject of any proceeding at law or in equity (except perhaps a damage suit against individuals who might interfere with the right to vote but who are not parties to this case), wherefore the proceeding is not a suit at law

or in equity and is not within the cognizance of federal courts.

It is the position of the defendant in this court that the jurisdictional questions raised the only issues that could have been passed upon by either of the lower courts or that can be considered here. We are mindful of the rule that, where a litigant asserts several independent and alternative contentions as grounds for a decision in his favor and the trial court, having sustained one of such contentions, therefore finds it unnecessary to pass upon other contentions, this court may, in its discretion, either review only the question decided below or may pass upon other contentions. In other words this court may decide a case upon grounds **present in the record but not passed upon by the lower courts** or, alternatively and in its discretion, if it does not affirm upon the only ground or grounds considered below, it may remand the case for consideration of the questions which, **though present**, the lower court deemed it unnecessary to decide.

But the existence of this court's discretion either to consider questions not dealt with below or, if it decides adversely the question which was decided below, to remand the cause for decision of the questions previously not considered **presupposes that the questions were properly before the lower courts and could have been decided by them.**

Now, in this case, the defendants' pleading was a motion to dismiss for want of jurisdiction under a special appearance. The defendant filed no other pleadings and did not encounter or engage the plaintiffs in any issue, of law or fact, as to the merits. Only two judgments could have been rendered. One was the judgment that was actually rendered, that is, a judgment sustaining the motion to dismiss the cause for want of jurisdiction. The other was a judgment, not upon the merits but in the nature of *respondeat ouster.* **The trial court could not have passed upon the substantive merits of the election question upon the pleadings before it.**

The most that it could have done would be to grant the defendant leave to file a motion in the nature of a demurrer to the merits or an answer. In other words, the defendant's admission of the facts pleaded was made for the purpose of testing the court's jurisdiction to decide the substantive questions sought to be presented and not for the purpose of eliciting a decision upon the merits.

For example, had the defendant's motion to dismiss been overruled, the plaintiffs would not have been entitled to a judgment on the merits but the defendant would have been given an opportunity to file an answer. Since he has no actual knowledge of many of the facts averred in the complaint, among others, the alleged fact that the plaintiffs are in the country's military service, the right to file such an answer and demand proof of that fact would be an important one.

Therefore the merits of the case were not before the District Court and could not have been decided by it. The District Court having dismissed the case for want of jurisdiction, it follows that upon appeal, the Circuit Court of Appeals could not properly have passed upon any question of the substantive merits. And it likewise follows that, although this court may, in its discretion, decide questions which were **presented** in the lower courts **but not passed upon**, it may not and should not decide questions which not only were not passed upon **but which could not have been passed upon because they were not presented.**

Suggestion in the nature of a motion that certiorari be denied for failure to present and argue the only questions properly involved.

Since the only questions before this court are jurisdictional questions and since the only questions discussed in the plaintiffs' petition and brief are questions pertaining

to the substantive merits of the case, we submit and suggest that this court might properly deny *certiorari* if for no other reasons than that the plaintiffs have failed to treat, argue or even discuss the *only* questions presented on the record.

At this point, we submit the suggestion, in the nature of a motion, that this court dismiss this petition for failure to consider the only questions properly involved.

If, however, that suggestion be not acted upon favorably to the defendant, then we present the considerations developed in this argument upon the questions of jurisdiction.

I.

The suit is in substance one against the State of Illinois.

It is unnecessary to collate and consider extensively the numerous authorities sustaining the general propositions (1) that a state is immune to suit in the federal courts, even by her own citizens (see *Hans* v. *Louisiana*, 134 U. S. 1) and that, when the object of a suit is actually to affect the sovereignty, it is without the jurisdiction of the federal courts even though it is brought in form against a governor or other state officer and not against the state and is not entitled against the state (see *Governor of Georgia* v. *Madrazo*, 26 U. S. 110; *Kentucky* v. *Dennison*, 65 U. S. 66; *New York Guaranty Co.* v. *Steele*, 134 U. S. 230, and *Cunningham* v. *Macon & Brunswick R. R. Co.*, 109 U. S. 446); for the plaintiffs do not question these premises in their abstract genericity as fundamental precepts of constitutional law and basic doctrines of sovereign immunity.

The plaintiffs, however, seek to avoid the import of these principles in the present case by asserting in their complaint and in their arguments that the defendant is sued,

not as Governor in the ordinary sense, but, in the language of plaintiffs' counsel, "*ex-officio*, in the capacity hereinafter designated." Although the plaintiffs do not designate the "*ex-officio* capacity" by any specific title, it is their theory that the Federal War-Time Voting Act imposes *federal* duties upon the Governor, as a *federal* functionary. They therefore seek to derive a principle that he is subject to federal process without infringement of sovereign immunity.

Now this precise contention has been passed upon adversely to the plaintiffs by this court in the case of *Kentucky* v. *Dennison*, 65 U. S. 66, already cited *ante* in support of the general proposition that suits against the Governor in his official character are in effect suits against the state. We now examine it in its specific application to the facts of the case at bar.

In that case, the State of Kentucky brought a suit against Dennison, who was the Governor of Ohio, to compel the latter to render to Kentucky a fugitive who had found asylum in Ohio from Kentucky's criminal law. The criminal act with which the fugitive was charged related to slavery. Dennison refused to honor the extradition warrant.

It appears, not from the opinion of the court, but from the argument of counsel, reproduced at page 80 of the official report, that the governor's obligation was claimed, in the language of counsel, to be "exclusively federal." Here we find an assertion of the identical theory invoked by appellants in the instant case, namely, that the present defendant's alleged and supposed "duty" is that of a federal official.

The Supreme Court of the United States held, however, is unmistakable terms, that Congress may not visit federal duties upon state governors as *ex-officio* deputies of the national government. The court said at page 107:

"* * * The act does not provide any means to compel

the execution of this duty, nor inflict any punishment for neglect or refusal on the part of the Executive of the State; nor is there any clause or provision in the Constitution which arms the Government of the United States with this power. Indeed, such a power would place every State under the control and dominion of the General Government, even in the administration of its internal concerns and reserved rights. **And we think it clear, that the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it; for if it possessed this power, it might overload the officer with duties which would fill up all his time, and disable him from performing his obligations to the State, and might impose on him duties of a character incompatible with the rank and dignity to which he was elevated by the State.**

"It is true that Congress may authorize a particular State officer to perform a particular duty; but if he declines to do so, it does not follow that he may be coerced, or punished for his refusal. And we are very far from supposing, that in using this word 'duty', the statesman who framed and passed the law, or the President who approved and signed it, intended to exercise a coercive power over State officers not warranted by the Constitution. But the General Government having in that law fulfilled the duty devolved upon it, by prescribing the proof and mode of authentication upon which the State authorities were bound to deliver the fugitive, **the word 'duty' in the law points to the obligation on the State to carry it into execution.**" (Emphasis supplied.)

This case, which has never been overruled or limited, is decisive of the case at bar. It holds that even another state (not private individuals, as in the instant case) may not compel the performance of an act which an act of Congress expressly declares to be the "duty" of the governor.

In the trial court, counsel for appellants, confronted by this decision, pointed to the fact that the court did in fact

indulge in discussion of the duty of the governor and declared it to be his duty, though performance of such duty could not be compelled, to return the fugitive to the demanding state. This discussion by the court was obviously a pure *dictum*, since the reasoning which it invoked could never, according to the court's holding, be made compulsory with respect to the governor.

Counsel for appellants stated that all that he wanted in the present case was a "similar declaration" by the court in the instant case. Thus counsel in effect confessed that all that was sought was an *obiter* expression upon the merits of the question with respect of which, by their failure to ask a writ of *mandamus* or other overtly coercive relief, they virtually admitted to be beyond the province of the Federal courts.

This case is not directly decisive of any question of sovereign immunity, for the plaintiff state was herself a sovereign and might have sued Ohio in this court. But it does hold the proposition, absolutely fatal to the plaintiffs' case, that Congress cannot impose federal duties upon a state official, at least with any expectation that federal courts will or can enforce them.

The case thus affirms two principles, each of which is, independently of the other, decisive of the case at bar. It holds:

> **First**: That a suit against the Governor with respect to his official duty to perform an act is a suit against a state. Since in this case, the plaintiffs are citizens, the instant suit is in violation of Illinois' immunity, whereas the cited case was brought by a sovereign.
>
> **Second**: That Congress cannot impose federal duties upon a Governor.

Once it is perceived that Congress could not impose upon state officials the duties of federal functionaries so as to render such state officials amenable to the process of federal

courts, the plaintiffs' whole thesis as to federal jurisdiction in this case fails utterly.

Although we realize that decisions of the lower federal courts are not authoritative here, we cite as cogent in its reasoning the case of *United States* v. *Clausen* (District Court, Western District of Washington, 1934), 291 Fed. 231. In that case it was contended that a federal *war measure,* enacted during the first World War, imposed upon state officials the duty to turn over to the alien property custodian funds or property in his possession when such funds belonged to alien enemies. It was held that this act would not sustain the issuance of federal process against state officers.

In the lower court, counsel for the plaintiffs, entirely misunderstanding the relevant principles and doctrines, cited as authority for maintaining a suit against the Governor such cases as *Ex parte Young,* 209 U. S. 143, *Sterling* v. *Constantine,* 287 U. S. 378, and other cases, all of which sustained the doctrine that state officials, including Governors, **may be enjoined from illegal acts**. Of course, the *rationale* of such cases is that a state official who acts illegally, even under the purport and color of state authority, acts as an individual and private trespasser **and not in any official capacity.** The injunction is simply anticipatory of the right which the plaintiffs would have, in an action of tort, against the defendants **as private individuals** if in fact they committed the illegal acts restrained. It is an old doctrine of common law that officials who act illegally are liable in their personal capacity in tort. Therefore equity can restrain those acts which, if committed, the common law could redress. The whole doctrine is predicated upon the personal, as distinct from the official, capacity of the defendant.

But the plaintiffs do not suggest that the defendant in the instant case is sued as a private citizen. Therefore the rule that officials may be enjoined from acts of private trespass is as inapplicable as it is fundamental.

Perhaps the fallacies in plaintiffs' argument can be most incisively demonstrated by asking the following question, which admits of a categorically "Yes" or "No" answer and by indicating that, no matter whether this question be answered "yes" or "no", jurisdiction cannot exist.

1. Would the Governor of the State of Illinois be bound to abide by the decisions of the federal courts in this case, if the decision should be opposed to his view that the federal ballot is not authorized by the State of Illinois?

If the answer to the above question is "Yes": If it is admitted that the judgment will be coercive, even if only in the sense that the Governor will be legally bound to obey it without regard to whether punitive measures could be taken against him for failure to obey it, then the suit is one to impose upon the Governor a legal obligation to obey, in respect to the conduct of the state government, the judgment of a court. It is thus clearly a suit against the State of Illinois and, moreover, is within the teachings of the *Dennison* case cited above.*

If the answer to the above question is "No": Then if no compulsion attaches to the judgment, it is not declaratory. It is merely advisory or hortatory. If it is the duty of the Governor to interpret the law of Illinois as he understands it and not as the court understands it, then the proceeding seeks, not a declaratory judgment at all, but a mere *dictum*.

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* It is interesting to note in passing that in their brief in the Circuit Court of Appeals, counsel answered this question, phrased previously as it is phrased here: "Legally, no. Morally, yes." This answer evinces counsel's complete misconception of the matter. Once it is admitted that no legal duty to obey exists, all purpose of legal proceeding is at an end. The plaintiffs thus confess that they seek nugatory *dicta*.

Moreover, the view that the Governor would be "morally" bound to follow the view of the court is not only irrelevant, when counsel excludes the purely "moral" from the domain of the legal, but is arrant nonsense. Of course a Governor who has taken an oath to support the Constitution has no moral right to abdicate his own honest conviction and substitute for that conviction the judgment of an equally honest court. If coerced by *mandamus*, he obeys a legal, not a moral, command. Absent legal compulsion, his own conscience, not that of a court, must be his moral or ethical preceptor.

II.

If it could be supposed that the Governor is not sued as a representative of the State of Illinois, then, even apart from any question of sovereign immunity, the instant proceedings would be nugatory for want of party or parties representing the State of Illinois.

The plaintiffs, realizing that the State of Illinois is immune to suit, disclaim any impleader of the Governor in his official capacity as such Governor and profess to sue him only in the character which they impute to him as *ex-officio* a functionary of the federal government.

We earnestly submit that the considerations developed under the preceding Point demonstrate conclusively that no such capacity can or does exist, that the suit is necessarily one against him in his capacity as Governor, that it seeks an adjudication of his duties as such Governor and that therefore is in effect a suit against the State.

However, under the present Point, we assume, *ex gratia* and for the sake of argument only, that, in some way or other, the Governor can be sued neither as a private citizen nor as Governor of the state but as a *quasi* official of the federal government. The plaintiffs admit that they cannot compel him, in any capacity whatever, to make the certification here sought. But they seek a declaration to the effect that the actual certification is unimportant and that, if the court determines that he should certify, then that judicial determination may take the place of the actual physical act of certification. (*See prayer of plaintiffs' complaint*, par. G, Tr. 22-23.)

Let us repeat that, for the sake of argument only, we assume under this Point that the defendant is not sued as the Governor of Illinois.

If that be so, then neither the State of Illinois nor any

representative of its government nor any of its officers are, in their official capacity, before the court. Even the defendant, upon this supposition, is not before the Court as Governor of the State. If this be so, a judgment declaring that in a *state* election, the conduct of which is administered by *state* officials, a certain ballot can be used, would be void because the government and the parties upon whom such a judgment must operate, if it could operate at all, would never have been impleaded or given a chance to be heard.

Here again the plaintiffs have impaled themselves upon dilemma that can be exhibited by the following question: Is it intended to bind state election officials, including the defendant as Governor and a state official and not merely as a federal functionary, by the judgment sought in this case?

If the answer to the above question is "Yes": Then the suit is not only forbidden by the doctrine of sovereign immunity (See Point I, *ante*), but even if all considerations of sovereign immunity be ignored, the judgment will still be a nullity because, according to the logic of the plaintiffs, the defendant is not sued as a Governor or representative of Illinois; no other representative of Illinois is sued; Illinois has not been sued and has not appeared and therefore, apart, we repeat, from questions of sovereign immunity, the declaratory judgment would not be binding upon the very persons whom it must bind if it is to be effective, that is, state officials who have not been impleaded. This consequence would not be the result of sovereign immunity by of failure to implead any representative of the State or its electoral agencies.

If the answer to the above question is "No": Then the suit seeks not a declaratory judgment, for it binds no one and will settle nothing, but is purely an advisory or hortatory judgment. The proceeding therefore presents no case or controversy. (See III, immediately *post*.)

III.

Unless this proceeding contemplates a binding adjudication as distinct from a mere pronouncement, it presents no "case or controversy" within the purview of the consitution. This is true even though it is a suit for declaratory judgment.

It is quite evident that counsel for the plaintiffs appreciate fully the most delicate exiguity of their theory in this case.

In order to avoid the inevitable result of dismissal of their suit for violation of Illinois sovereign immunity, they seek so far to attenuate the effect of any judgment which might be pronounced in this case as to relieve it of the force of an assault upon state sovereignty. But if the judgment is to have no vigor, then it is not a judgment at all; and the cause ceases to present a "case or controversy."

Plaintiffs' counsel try to navigate the straits between the shoals of state sovereignty and the whirlpool of "no controversy" by asking the court to impute some sort of compulsion, legal or moral, to the judgment, which compulsion shall be sufficient to relieve the judgment of the purely "advisory" character of which this court said in *Aetna Life Insurance Company* v. *Haworth*, 300 U. S. 227, would render the matter not a case or controversy, and yet not enough compulsion to make the judgment an attempt to bind the state and therefore void as in violation of sovereign immunity.

We say that is logically impossible to admit that a judgment in this case could have no binding effect upon state officials who disagree with it, without admitting that no case or controversy is presented; but that once it is maintained that the judgment would be operative upon state officials, then the suit is one to determine the rights of the state with respect to the conduct of elections and is forbidden by the doctrine of sovereign immunity.

TO THE EXTENT THAT A JUDGMENT WOULD BIND STATE OFFICIALS WITH RESPECT TO AN ELECTION CONDUCTED BY THE STATE GOVERNMENT, THE JUDGMENT WOULD INFRINGE SOVEREIGN IMMUNITY; TO THE EXTENT THAT IT DID NOT BIND THEM, IT WOULD BE NO JUDGMENT AT ALL; FOR A JUDGMENT IS, BY NATURE, A BINDING ADJUDICATION.

We call the court's attention to the following consideration as clearly indicating the extremity to which the plaintiffs are forced:

The plaintiffs do not seek any writ of mandamus against the defendant. They would, of course, seek such a coercive writ if the logic of their position would permit, but they recognize that a writ of mandamus will not lie against the defendant *if he is sued as Governor.*

Now if, as they seek ingeniously to contend, he is not sued as Governor at all but is sued as a federal official, there is no reason why a writ of *mandamus* will not lie. But actually to ask a coercive writ against the defendant, who is the Governor of the State of Illinois, when the purpose of such writ would be to control an Illinois election would make it obvious to any court that the defendant is in fact sued as a Governor and not as a state official despite the plaintiffs' protestations to the contrary. The failure to ask a writ of *mandamus* can be interpreted only as a tacit but nevertheless most significant recognition that the subject matter of this cause is not one for federal adjudication and remedial process. How, then, can the federal courts be invested with jurisdiction merely because remedial process is not sought?

In short, we contend that the plaintiffs have admitted that they could not maintain this suit if they asked remedial process. But failure to ask such a process does not change the character of the controversy. It merely changes the character of the relief sought.

In the *Aetna Life Insurance Company* case, 300 U. S. 227, this court made it clear that, although a declaratory judgment need not contemplate the immediate issuance of process in execution or enforcement thereof, nevertheless it must so bind and conclude the parties as to be effective as *res judicata* in later proceedings. Now there can be no later proceedings in which the plaintiffs can claim the effect

of any judgment here rendered, for no one suggests any rights which could be asserted against the defendant if he disobeyed the order, even if a judgment should be rendered favorably to the plaintiffs and the defendant disobeyed it. *A fortiori,* no other election official would have to obey it.

We take it to be an axiom that courts will not make decisions that they cannot enforce. The defendant, should the court decide the substantive political question here involved adversely to his views, would find himself in the position of having a firm conviction, unchanged by the Court's pronouncement, as to where his duty lay under the federal act. Should the Governor voluntarily obey the judgment out of deference and respect to the court, he would be abdicating his own discretion and responsibility. Should he refuse to obey the decision, abiding by his own convictions, instead of the advice contained in the judgment, the court would be in the position of having done a vain thing and having rendered an opinion which it was impotent to enforce.

This court will have no difficulty in envisioning the consequences which will ensue if courts declare their ideas as to the duties of other branches of the government, or as to the officers of other sovereignties, when they may not enforce compliance with those ideas. They will act as counsellors to executive officers, not judges pronouncing judicial commands or even conclusive determinations.

IT IS THE EARNEST POSITION OF THE DEFENDANT THAT THE MATTERS DISCUSSED UNDER THE FOLLOWING HEADING ARE NOT BEFORE THE COURT AND CANNOT PROPERLY BE CONSIDERED. THIS MATTER IS INSERTED FOR REASONS HEREAFTER STATED.

IV.

The complaint utterly misconceives the intent of the Soldiers' Voting Act.

In the Introduction to the present Argument, we earnestly insisted that the only issues before the lower court were questions of jurisdiction, that the defendant's pleadings did not raise any question on the substantive merits, that the only possible judgments upon a motion to dismiss for jurisdiction were either a judgment sustaining the motion and dismissing the cause, or a judgment in the nature of *respondeat ouster*, and that this case is not within the rule that a reviewing court may in its discretion consider questions presented to but not passed upon by lower courts because in this case the merits were not presented to the lower courts by the pleadings.

But since the plaintiffs have devoted the entirety of their brief to the substantive merits, with no discussion of the jurisdictional questions, and since, in our earnest view, the plaintiffs' contentions are absolutely destitute of even the slightest merit, we venture the following brief reply to their arguments on the substantive questions.

Section 302 of the Act in question is as follows:

"APPLICATION OF THIS TITLE."

"SEC. 302. (a) Subject to the provisions of subsection (b), the provisions of this title shall apply with respect to the following:

(1) Members of the armed forces and the merchant marine of the United States, outside the United States.

(2) Persons serving with the American Red Cross, the Society of Friends, the Women's Auxiliary Service Pilots, and the United Service Organization, outside the United States who are at-

tached to and serving with the armed forces of the United States.

(3) Members of the armed forces, inside the United States."

"(b) The provisions of this title shall apply to, and the ballot provided for by this title may be used by—

"(1) an individual referred to in paragraph (1), (2), or (3) of subsection (a), if he is a citizen of a State whose Governor **has certified, prior to July 15 of the year in which the election is to be held, (A) that such State has made no provision for procedure which will enable the citizens thereof to whom subsection (a) applies to vote by State absentee ballot, and (B) that the use of ballots provided for by this title is authorized by the laws of such State;**"

"or (2), an individual referred to in paragraph (1) or (2) of subsection (a), **if he is a citizen of a State whose Governor has certified, prior to July 15 of the year in which the election is to be held, that the use of ballots provided for by this title is authorized by the laws of such State, even though** the Governor thereof does not make the certification referred to in clause (A) of paragraph (1), but only if such individual states in his oath that, prior to September 1, he made application for a State absentee ballot but, as of October 1, has not received it." [Emphasis added.]

"No individual who is not included under paragraph (1) or (2) of this subsection shall be entitled to use, or be furnished, a ballot under this title. Certifications referred to in this subsection shall be made to the Commission."

The prerequisite to the use of the federal ballot is, according to the deliberate and unmistakable language of Congress, the **governor's certificate** either (1) that the state has made no provision for procedure which will enable the servicemen to vote or (b) that, notwithstanding such provision, "the use of ballots provided for by this ballot is authorized by the laws of such state."

Let it be noted that it is not the fact, **but the governor's determination and certification of the fact prior to July 15,** which is made decisive by the act of Congress.

The reason for this language is not far to seek. The extent to which Congress could supersede state election laws was regarded as highly debatable by constitutional authorities. The extent to which Congress **should**, even if it could, supersede state election laws was, as this court knows perfectly well, a most delicate issue in Congress. There can be no doubt—none whatever—that it was the purpose of Congress to confide the power to decide this question to the governor of the several states. The act does not contemplate a federal decision of the question, whether that decision be made by federal courts, federal executive agencies or even Congress itself.

To hold that the governor is subject to the jurisdiction of federal courts would be to frustrate the unmistakable intent of Congress.

The court is not called upon to consider whether Congress might, if it chose, provide for a federal ballot, not for the election of members of Congress but also for presidential electors, notwithstanding the fact that the use of such ballots might not be authorized by the laws of the state, because Congress has explicitly and unmistakably declared that, whatever may be the extent of its powers, it did not wish to exert them unless the **governor of the state** should certify either

> "(A) that such State has made no provision for procedure which will enable the citizens thereof to whom subsection (a) applies to vote by State absentee ballot, and (b) that the use of ballots provided for by this title is authorized by the laws of such State;"
>
> *or*
>
> "that the use of ballots provided for by this title is authorized by the laws of such State;"

although in the latter event, the ballots can be used "only if such individual states in his oath that, prior to September 1, he made application for a State absentee ballot but, as of October 1, has not received it."

It is manifest that Congress, whether restrained by constitutional considerations or by a sense of the extreme delicacy of the question of state *versus* federal control of elections even apart from constitutional limitations, left the determination and certification of this fact to the chief executive. The act does not contemplate that the determination shall be made by a federal court.

Conclusion.

For the reasons urged in the foregoing brief and argument, it is respectfully submitted that the petition for writ of *certiorari* should be denied.

Respectfully submitted,

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